78-33 FILE COPY JUN 29 MICHAEL RODAK, J

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-33

AIR TERMINAL CAB, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

AIRWAY TAXI COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Petitioners Air Terminal Cab, Inc. and Airway Taxi, Inc. pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in these consolidated cases on May 22, 1973.

CITATIONS TO OPINIONS BELOW

These cases originated in the United States District Court for the Eastern District of Missouri and were submitted to the Court on stipulated facts. The United States

District Court Opinion is reported at 341 F.Supp. 1257 (E.D. Mo. 1972) and is included in Appendix B attached hereto, p. A-22. The Opinion of the United States Court of Appeals for the Eighth Circuit is as yet unreported and is included in Appendix B attached hereto, p. A-11.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered April 30, 1973 (R. II, p. 12). Rehearing was denied May 22, 1973 (R. II, p. 29). Jurisdiction is invoked under 28 U.S.C., Section 1254(1). The jurisdiction of the United States District Court for the Eastern District of Missouri was originally invoked because these cases arise under the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether taxicab companies which own twelve taxicabs each, which maintain no telephones or telephone directory listings, no office, no garage, no radio dispatch facilities, which do no media advertising and have no supervisory personnel, and which share with the taxi drivers on a percentage basis the fares received, have "control" over the manner or means of the operation of the taxicabs in such a fashion as to render the companies liable for employment taxes on the portion of the fares retained by the taxicab drivers.

2. Whether the employer-employee relationship between taxicab companies and drivers operating company-owned taxicabs on a fare sharing arrangement is to be determined on the basis of the presence or absence of control by the companies over the drivers while they are operating the taxicabs or on the basis of general situational facts such as operation of the cabs in an area restricted by licenses, the driving of regular shifts, and the duty of the taxicab drivers to list fares in order to divide them on a percentage basis with the taxicab company.

STATUTES, REGULATIONS AND REVENUE RULINGS INVOLVED

STATUTES

26 U.S.C. 3121(d)(2);

26 U.S.C. 3401(e);

26 U.S.C. 3306(i).

TREASURY REGULATIONS

31.3121(d)-1;

31.3401(e)-1;

31.3306(i)-1.

REVENUE RULINGS

Rev. Rul. 66-267, 1966-2, Cum. Bull. 443;

Rev. Rul. 71-572, 1971-2, Cum. Bull. 347.

STATEMENT OF THE CASE

The taxpayers, Air Terminal Cab, Inc. and Airway Taxi Company, Inc., brought these cases, now consolidated, in the United States District Court for the Eastern District of Missouri for refund of Federal Withholding, FICA and FUTA taxes, penalties and interest assessed against the taxpayers by the Internal Revenue Service.

The taxpayers' operations are essentially the same. Each is a taxicab company operated from the home of its respective president. Each owns only twelve taxicabs and each leases the taxicabs to taxi drivers under an arrangement by means of which the driver records the fares received, deducts the amount paid by him for gasoline during

his operation of the taxicab and remits fifty per cent of the balance to the taxicab company by leaving it in a metal box located at an independent service station where taxis are parked when not in use. Taxpayers maintain no offices, no garage, no mechanics and no supervisory employees. They maintain no radio or telephone dispatcher and the taxis, although they are equipped with meters, are not equipped with radios. The taxicab companies do not advertise and do not have telephone numbers listed in the telephone directory. The drivers do not report regularly to the presidents of the respective companies. The presidents have other business interests and devote only part time to the companies. The drivers are members of the Teamsters Union. There is a Union contract. The drivers work regular shifts and have certain fringe benefits. The taxicabs are operated under licenses issued to the taxpayers by St. Louis County, which licenses restrict operation of the taxicabs to the unincorporated areas of St. Louis County. The primary source of taxicab business in the unincorporated areas of St. Louis County for which radio dispatch facilities are unnecessary is the pick-up of passengers from Lambert Air Field. That is the primary source of business for the drivers of taxpayers' cabs, although they do, by agreement with passengers, pick them up elsewhere, and although they do, from time to time, on a negotiated basis, transport passengers to points as much as one hundred fifty miles from the St. Louis area.

The taxpayers each paid Withholding, FICA and FUTA taxes for a single quarter. The taxpayers brought suit for refund of the taxes paid and the Government counterclaimed for the balance of the taxes assessed for the period of time in question, 1965 through 1968. The District Court held for the taxpayers on the authority of **Party Cab Company v. United States**, 172 F.2d 87 (7 C.A. 1949) and **United States v. Fleming**, 293 F.2d 953 (5 C.A. 1961), because the taxpayers did not have the requisite "control"

over the drivers to render them "employees" under the provisions of the Internal Revenue Code and applicable regulations. The United States Court of Appeals for the Eighth Circuit reversed and petitioners, plaintiffs in the District Court and Appellees in the United States Court of Appeals for the Eighth Circuit, bring this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. **Party Cab Company v. United States**, supra, has been until now, the lead case governing the status of taxicab drivers for the purposes at hand, and succeeding cases, Treasury Regulations and Internal Revenue Rulings have been consistent with it. It turns upon the following holding:

> "The matter of control which is material is that which the plaintiff exercised over the drivers during the period they were in possession of the cabs rather than what the plaintiff might do either prior or subsequent to such period. Considered in this light, any control exercised by the plaintiff was quite meagre."
>
> (l.c. 172 F.2d 92, Appendix C, p. A-48)

The United States Court of Appeals in the Eighth Circuit in the instant case based its decision that the drivers of petitioners' taxicabs were "employees" upon the following holding:

> "On the other hand, the drivers had regular working hours, were limited as to where they could pick up customers, could not use cabs for their personal use, were required to account for fares by submitting 'trip sheets,' and were required to split (after deducting amounts spent for gas and oil) their fares evenly with appellees . . . Where a company has a general measure of control over the manner in which services of

> their taxicab drivers are performed, such as operation in a restricted territory, control of hours worked, and the governing of income to the drivers, the employer-employee relationship exists for purposes of the federal employment taxes. (Appendix B, pp. A-19-A-20).

The decision is in conflict with **Party Cab Company v. United States**, supra.

2. The issues here presented are of importance to the administration of the Federal Tax Laws as applied to the taxicab industry throughout the nation. The history of the Internal Revenue Department's position on these issues has been one of litigation and acquiescence in adverse result (R. I, p. 113). It is believed that the decision of the United States Court of Appeals for the Eighth Circuit in the instant case represents a substantial departure from the principles announced in the **Party Cab Company** case, supra, and followed in **United States v. Fleming**, 293 F.2d 953 (5 C.A. 1961); **New Deal Cab Company v. Fahs**, 174 F. 2d 318 (5 C.A. 1949); and **Economy Cab Company v. Fahs**, 174 F.2d 321 (5 C.A. 1949), as well as in the rulings of the Internal Revenue Service (Rev. Rul. 66-267 [1966-2 Cum. Bull. 443]; Rev. Rul. 71-572 [1971-2 Cum. Bull. 347], attached hereto in Appendix A, pp. A-3 and A-7). It is believed that if left undisturbed, the opinion in the court below will quickly result in changes in both the published and the unpublished positions of the Internal Revenue Service with disastrous results to small business taxpayers such as these petitioners.

3. The opinion and decision of the United States Court of Appeals for the Eighth Circuit is believed to be in error for three reasons.

First, the court below predicates a finding of "control" by taxicab owners over taxicab drivers on regular shifts, license restrictions, and the necessity for an accounting where rental is on a percentage basis. The first two of these

indicia are necessary ingredients of the operation of any company-owned taxicabs in a large metropolitan area, and the latter is a necessary ingredient of any such operation where the proceeds of the operation of the taxicab are divided between the owner and the driver. Such a decision is tantamount to a holding that virtually all taxicab drivers are "employees."

Second, the court below was in error in drawing even general indications of "control" from the work schedule provisions of the Teamster contract and the area restrictions of taxicab operation. The Teamster contract sets maximum and minimum schedules which bind both driver and owner, "requiring," for example, not only that the driver drive the taxicab a minimum of nine hours per day, five days per week, but that the owner make the taxicab available for operation nine hours per day, five days per week (R. I p. 73). The area restrictions are quite clearly restrictions imposed by the licenses issued by St. Louis County, not restrictions imposed by the employers (R. I p. 55). As indicated, the trip sheet is a necessary device for computing the percentage division of the proceeds and can in no sense be an indication of "control" by the taxicab owners.

Third, this Court, in **United States v. Silk**, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947), announced a rationale for making the determination of "employee" status somewhat broader than the "common law" test. The Treasury Department quickly proposed a regulation broad in scope, basing its position on this Court's opinion in **United States v. Silk**, supra. The Congress rejected that regulation by amending the then Section 1101(a)(6) of the Social Security Act defining "employee" to exclude those who were not employees under the common law rules. President Truman vetoed the amendment expressly on the ground that it would take certain classes of people, including "taxicab drivers," out from under the coverage of the Social Se-

curity Act. The Congress passed the resolution over the veto of the President (P.L. 642, 80th Congress, 2nd Session). Shortly thereafter, the United States Court of Appeals for the Seventh Circuit reached its decision in **Party Cab Company v. United States**, 172 F.2d 87 (7 C.A. 1949) that cab drivers driving company-owned taxicabs, operating from a company-owned garage under company-owned licenses and on regular shifts, were not "employees" under the "usual common law rules" because of lack of control by the cab companies over the drivers during the operation of the taxicabs. The decision rests in large part upon a review of the above legislative history (l.c. 172 F.2d 89-90, 92). This Court has recently reviewed the same legislative history in **United States v. Webb**, 397 U.S. 179, 90 S.Ct. 850, 25 L.Ed. 2d 207 (1970) and in so doing, has included from Senate Report No. 1255, 80th Congress, Second Session, pages 10 and 11, the express Congressional objection to the earlier proposed Treasury Regulation to the effect that the broad test of "economic reality" would permit untrammeled administrative discretion as to who was an "employee" and who was not (l.c. 397 U.S. 188).

Reduced to its essentials, the opinion of the United States Court of Appeals for the Eighth Circuit in the instant case finds "control" of the taxicab drivers in the situation of taxicab owner and taxicab driver as such. This is the "economic reality" test without the name. One has only to compare the letter ruling of the Internal Revenue Service pertaining to Laclede and Red Top Cabs in St. Louis (R. I, pp. 110-114) and Rev. Rul. 71-572 (App. A. p. A-7) with the Internal Revenue Service position in the instant case to see untrammeled administrative discretion in gross form. The Internal Revenue Service takes the position that where rental taxicabs are media advertised and the drivers regularly respond to a radio dispatcher, the drivers are not "employees" if they pay a fixed rental, while they are "employees" if they pay a percentage rental.

In the instant case, the Internal Revenue Service takes the position, now affirmed by the court below, that taxicab drivers who have virtually no contact with any supervisory employee, garage or radio dispatcher are nevertheless employees because of the percentage rental arrangement.

It is believed that the decision of the court below, in permitting this kind of broad administrative discretion, has erroneously exposed these taxpayers to ruinous assessments which they could not rationally have foreseen and will expose others to equally ruinous retroactive assessments.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted

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